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IN THE

Supreme Court of the United States

OCTOBER TERM 1983

SUN MYUNG MOON, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, THE NATIONAL CONFERENCE OF BLACK MAYORS, THE NATIONAL BAR ASSOCIATION AND THE HONORABLE MERVYN DYMALLY AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Did the court below err in ruling that the Government may force an unpopular religious leader to be tried by jury because he has exercised his First Amendment rights to criticize the Government's motives for prosecuting him?

2. Did the court below err in ruling that a jury may be permitted to examine the internal structure of a church or the uses to which church assets are put in order to determine whether the leader of that church holds the assets personally or in trust for the church?

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By consent of the Petitioners and the Respondent as evidenced by the letters of consent filed herewith, the Southern Christian Leadership Conference, The National Conference of Black Mayors, The National Bar Association and the Honorable Mervyn Dymally respectfully submit this joint brief *amici curiae* in support of the Petition for a Writ of Certiorari.

INTEREST OF AMICI

The Southern Christian Leadership Conference ("SCLC"), the National Conference of Black Mayors ("NCBM") and the National Bar Association ("NBA") Are predominently Black organizations which have a special interest in this case because of the threat which it poses to the rights of minority group members both with respect to the right to a fair trial and the right to freedom of worship. The Honorable Mervyn Dymally is the United States Representative from the Thirty-first Congressional District in California.

The Southern Christian Leadership Conference ("SCLC") was founded in 1957 by the Reverend Martin Luther King and other religious leaders to provide Christian guidance and leadership in the struggle for interracial unity, human rights and equality of opportunity. Committed to nonviolent direct action as the means to achieve social justice, the SCLC has over 300 chapters and affiliates nationwide. Its membership consists of churches, labor unions, student groups and other organizations as well as individuals.

The National Conference of Black Mayors was founded in 1974 and currently is composed of 252 Black mayors who serve municipalities ranging in population from 100 to well over 5,000,000. The NCBM's purpose is to provide its members with information and assistance as they work to improve the quality of urban life for all.

The National Bar Association (NBA) is a professional organization for lawyers. Currently, it has over 7,000 members most of whom are Black. Founded in 1925, the NBA has had special concern from its inception for the constitutional and civil rights of all Americans.

The Honorable Mervyn Dymally is the United States Representative from the Thirty-first Congressional District in California and the former Lieutenant Governor of that State. Congressman Dymally represents approximately 525,000 constituents from a wide variety of racial and ethnic backgrounds.

He joins in this brief as an expression of his concern that the right of freedom of worship and to a fair trial be preserved for all citizens.

The dedication of these *Amici* to the principles of equal justice and freedom of worship and their grave concern that the decision of the Appellate Court in this case poses a threat to those principles has prompted them to file this brief *amici curiae* in support of Reverend Moon's Petition for a Writ of Certiorari.[1]

The SCLC, NCBM, NBA and the Honorable Mervyn Dymally file this brief not out of sympathy for Reverend Moon and his movement, but rather out of deep concern that Reverend Moon was denied equal justice because of his status as the controversial leader of an unpopular religious movement. The *Amici* believe that Reverend Moon's trial and conviction for tax fraud and conspiracy raise grave constitutional questions which were inadequately considered by the Appellate Court which affirmed Reverend Moon's conviction. The *Amici Curiae* fear that the opinion of the United States Court of Appeals for the Second Circuit, if allowed to stand, will constitute dangerous precedent whenever the Government prosecutes unpopular religious or political leaders.

Two issues are of most urgent concern to the *Amici Curiae:* first, whether the Government may force an unpopular religious leader to be tried by a jury because he has exercised his First Amendment rights to criticize the Government's motives for prosecuting him; and second, whether a jury may be permitted to examine the internal structure of a church or the uses to which church assets are put in order to determine whether the leader of that church holds the assets personally or in trust for the church.

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[1] Although the limited resources of the several *Amici* represented herein required the Unification Church to defray certain printing and travel costs and attorneys' fees incurred in the preparation of this brief, the brief was written and is being filed by Jewel Lafontant solely at the direction and in the interest of the *Amici* themselves.

The first issue is of particular concern to the SCLC, NCBM, NBA and Congressman Dymally because minority group members must rely upon the courts if they are to enjoy the full rights of citizenship and, conversely, are especially vulnerable to oppression and unfairness if the courts cease to safeguard the rights of unpopular defendants.

The *Amici* are gravely concerned by the second issue because of the devastating impact which it may have on unsophisticated unstructured ministries which serve the poor community. Many ministers lack the resources and legal sophistication to incorporate their churches. Few poor parishioners are sophisticated enough to utter the magic words "to be held in trust" when they make contributions to their churches. Under the Appellate Court's opinion, such ministers would be vulnerable to criminal conviction for tax evasion at the whim of a jury.

SUMMARY OF ARGUMENT

Given the clear evidence showing that it was unlikely or impossible for Reverend Moon to receive a fair trial by jury, it was violative of his constitutional rights for the Government to withhold its consent to a waiver of the right to trial by jury and for the trial court to fail to order a bench trial notwithstanding the Government's failure to consent.

The jury instructions trammeled the religious liberty of Reverend Moon and his followers in that: (1) the jury was not instructed with respect to Reverend Moon's position and role within the Unification Church; (2) the jury was impermissibly permitted to consider the structure of the Unification Church in considering whether Reverend Moon held certain assets personally or in trust for the church; (3) the jury was impermissibly permitted to decide for itself, on any basis it chose, whether various expenditures made by Moon were made for "personal" or "business" purposes as opposed to "religious" purposes.

ARGUMENT

A.

Forcing Reverend Moon to Submit to Trial by Jury Was Manifestly Unfair

Under the circumstances of this case, it was a violation of Reverend Moon's rights to force him to stand trial by jury.

It is a matter of common knowledge that Reverend Moon is the leader and prophet of a novel religious movement, one which many view as incompatible with traditional Christian beliefs. History clearly demonstrates that no one is so vulnerable to popular hatred and persecution as the leaders of novel religious or political movements. In this case, Reverend Moon documented through use of a careful public opinion survey that he is the object of widespread public hostility (A. 801-03; 818-20; 916-1002). This evidence strongly indicated that it was most unlikely, and perhaps impossible, for Reverend Moon to receive a fair trial by jury. Rather than eliminating the possibility of unfairness in this case, the jury selection process simply confirmed that Reverend Moon could not receive a fair trial by jury. Although allowed far more than the usual number of challenges, Reverend Moon's defense was unable to eliminate from the jury all who held negative views about Reverend Moon and his church. Of the jury which was ultimately selected, ten of the twelve held negative preconceptions about Reverend Moon or his movement.[2] Under these circumstances, the *Amici* believe that it was a clear violation of Reverend Moon's rights to force him to stand trial by a jury.

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[2] As summarized by the Petitioners (App. Br. p. 23) the negative preconceptions articulated by the jurors were as follows:

—Mary K. Nimmo, forelady, had heard that the Unification Church was a "cult," "making money on young people," and "wouldn't have wanted [her] children to have been a part of it." T473; see also 449, 477-80.

—Esperanza Torres knew of a "deprogramming" controversy involving a Unification Church member and concluded "that the

(Footnote continued on following page)

The Sixth Amendment guarantees criminal defendants the right to an *impartial* trial by jury. This right exists "primarily for the protection of the accused," *Patton* v. *United States,* 281 U. S. 276 (1930) overruled on other grounds, *Williams* v. *Florida,* 339 U. S. 78 (1970). The purpose of trial by jury is to provide, through community participation in the determination of guilt or innocence, a bulwark against Government oppression. *Williams* v. *Florida,* 339 U. S. 78, 100 (1970); *Duncan* v. *Louisiana,* 391 U. S. 145, 156-57 (1968).

Where a defendant is the object of popular hostility as well as government prosecution, a jury can become a frightening

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(Footnote continued from preceding page)

parents [of the member] are right . . .," doubted Reverend Moon was a genuine spiritual leader (T847-48), and considered the Unification Church a "cult" involving "mostly young people" (T857). See T849, 852, 862-63, 871, 873-75.

—Rose Spencer did not "think" that it was proper for religious groups to invest in businesses, and felt that it was improper for religious groups to solicit funds publicly. T1349-50; see also 1358.

—Doris Torres had heard that "some people think [Moon] is a god" (T1391) and that the Unification Church "brainwashes" people. T1394.

—Claudette Ange had heard that Moon "was brainwashing some teenagers" and "has children selling . . . things . . . to get the money to buy property." T1514-15.

—Maria Abramson had not heard of Moon, but thought that religious cults brainwash young people (T1588), and believed religious groups "should collect their money in the church," not in public (T1587-88).

—Paul Stanley had heard about deprogramming and young people being "brainwashed" and "used for selling things." T1650; see T1631-32, 1636.

—Freddie Bryant thought that churches should raise funds by donations from their own members and not by "go[ing] into a complete business." T1683-85.

—Amerria Vasquez had heard that the "Moonies" "indoctrinate the young people in the church," and "are taking over New York City." T2052.

—Ernest Fetchko had heard that the "Moonies" get members "by brainwashing them." T2106.

weapon of oppression rather than a bulwark of liberty. As John Stuart Mill stated:

> "When society itself is the tyrant . . . its means of tyrannizing are not limited to the acts which it may do by the hands of its political functionaries .... Protection against tyranny of the magistrate is not enough: there needs protection also against the tyranny of the prevailing opinion and feeling . . ." Mill, *On Liberty*, Crofts Classics Ed. (1947) p. 4.

When defendants are hated or feared because of their political or religious beliefs, bench trials rather than jury trials may be the surest safeguard of civil liberties since the jury may be little more than an enthusiastic accessory to governmental oppression.

That defendants may need protection from juries was recognized in *Singer* v. *United States*, 380 U.S. 24 (1965). There, this Court, while holding that the Constitution does not give criminal defendants an absolute right to waive a jury trial, affirmed that government prosecutors are not ordinary parties to a proceeding, but " 'servant[s] of the law' with a 'twofold aim . . . that guilt shall not escape or innocence suffer.' " 380 U.S. at 37. The Government's duty to consider the rights of the accused necessarily includes the obligation to agree to a bench trial in cases where popular hostility toward a defendant makes it unlikely that a defendant will receive a fair trial before a jury." Thus, in *Singer*, the Court stated that there:

> "might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of a fair trial." 380 U.S. at 37.

Surely, this is precisely such a case. Reverend Moon's evidence of public hostility toward him and the negative opinions about Reverend Moon elicited from the veniremen during *voir dire* made it manifestly unfair for the Government to withhold consent to a bench trial.

Standing alone, the Government's refusal to consent to a bench trial would have been a violation of Reverend Moon's constitutional rights, but the Government compounded its wrong by withholding its consent for an impermissible reason. Although not required to give any reason for its refusal to consent to a waiver of jury trial, the Government did volunteer a reason—namely, that Reverend Moon's criticism of the prosecution, in a public speech which was later published in the *New York Times*, made a jury trial necessary lest he "blame any adverse result in this case on religious or racial bigotry." A. 1028. Thus, by the Government's own admission, the sole reason for its refusal to consent to Reverend Moon's request was the public criticism which he had leveled against it and its fear that he would similarly criticize the decision if the Government won. The Government's insistence on a jury trial specifically because of Reverend Moon's exercise of his First Amendment rights is a clear violation of the Constitution. *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972).

The *Amici* are deeply concerned that the Second Circuit failed adequately to consider this issue. Its decision affirming denial of a bench trial is tantamount to authorizing the Government to use the threat of a jury trial as a weapon to silence unpopular defendants and the jury trial itself as punishment for the recalcitrant. This is precedent which cannot be allowed to stand and which must be reviewed and reversed by this Court.

Further, this Court should clearly establish that the trial judge had authority to overrride the Government's objection to waiver of the jury trial and that he erred by failing to use that authority. The trial judge expressly recognized that a nonjury trial would have been fairer (Tr. 1760; 1752; 1759; 1761) but denied Reverend Moon's motion for a bench trial in the belief that the law "seem[s] to put no restrictions upon the prosecution being able to insist upon a jury." (Tr. 1752). Based on what proved to be an erroneous assumption that the case would

involve only "pretty dry and pretty dull" (Tr. 1739) tax issues rather than issues concerning the beliefs of the Unification Church (Tr. 1758-59), the judge gave no consideration to the compelling circumstances exception set forth in *Singer*. This was error. In cases involving far less public hostility toward defendants, other trial courts have recognized the need to grant requests for nonjury trials over Government objections. Thus, in *United States* v. *Braunstein*, 474 F. Supp. 1 (D. N. J.), the court granted the defendant's motion for a bench trial over the Government's objection where:

> "the government puts nothing in the balance other than good reputation and motive to weigh against the overwhelming showing of sound reasons presented by the defendants." 474 F. Supp. at 14.

Accord: United States v. *Panteleakis*, 422 F. Supp. 247 (D. R. I. 1976) (request for bench trial granted over government objection where government's refusal to consent is "unreasonable and arbitrary." 422 F. Supp. at 250); *United States* v. *Schipani*, 44 FRD 461 (E. D. N. Y. 1968) (request for nonjury trial granted over Government's objections where substantial danger that defendant's association with organized crime would prejudice a jury.)

The *Amici* firmly believe that all criminal defendants are entitled to receive as fair a trial as possible. There can be no doubt in this case that it would have been fairer, as the trial judge found both before *voir dire* and after, to give Reverend Moon a bench trial than to force him to stand trial in front of a jury which was bound to be negatively predisposed toward him and his religion. That the Government withheld its consent to a bench trial because of Reverend Moon's public criticism compounds its wrong. It is urgently important for this Court to affirm the duty of the Government to agree to bench trials, and the power and duty of trial courts to authorize bench trials over the Government's objection, where, as here, public hostility toward a defendant makes a fair trial by jury unlikely or impossible.

B.

The Jury Instructions Infringed Upon the Religious Liberty of Reverend Moon and His Followers

A second issue of deep concern to the *Amici* is that the jury instructions in this case permitted the jury to ride roughshod over the religious beliefs of Reverend Moon and his followers. The critical issue in this case was whether certain assets held by Reverend Moon in his own name were his property or whether, on the contrary, he held those assets in trust for the Unification Church. This was an issue which was inextricably linked to Reverend Moon's role in the Unification Church and to his religious views and those of his followers. As Judge Oakes wrote in his dissenting opinion:

> "this case did not involve a claim that an ordinary lay taxpayer held certain assets in a private trust for the benefit of another. On the contrary, the taxpayer here was the founder and leader of a world-wide movement which, regardless of what the observer may think of its views or even its motives, is, nevertheless on its face, a religious one, the members of which regard the taxpayer as the embodiment of their faith." (Oakes, J., dissenting opinion, p. 3)

No one disputes that the most important consideration in determining whether Reverend Moon owned the disputed assets personally or in trust for the Unification Church is the intent of the donors. If the donors intended Reverend Moon to use their gifts on behalf of the church, the assets would be held by Reverend Moon in trust for the church regardless of whether the donors had actually used the correct legal terminology. (See, Oakes, J., dissenting opinion, pp. 5-6). Obviously, the intent of the donors could be understood in this case only if the jurors understood Reverend Moon's position and role within his church. Yet, the trial court refused to instruct the jurors that Reverend Moon's followers view him as the embodiment of their faith, commenting that such an instruction "makes him a walking unincorporated association." (Tr. 6119). The refusal

to give this instruction demonstrates the disregard with which the beliefs of Reverend Moon's followers were treated and the license which the jurors were given to impose their own views of appropriate organization on the Unification Church.

Consistent with the short shrift given to the views of Reverend Moon's followers with respect to his role within the church is the fact that the trial court's instructions permitted the jury to determine for itself, on any basis it wished, whether the structure of the Unification Church supported the Government's contention that Reverend Moon owned the assets personally and whether the uses to which he put the assets were religious.

The organization of a church is a matter of transcendent theological importance. A church's organization or lack thereof directly reflects its theology with respect to man's relationship with God. *See, e.g., Morey* v. *Riddell*, 205 F. Supp. 918 (S. D. Cal. 1962) (lack of formal organization "stem[s] from the very doctrinal ties that bind its members together." 205 F. Supp., at 919). An essential element of religious liberty is the liberty of the church to choose its own structure. *Maryland and Virginia Eldership* v. *Church of God*, 396 U. S. 367, 369 (1970); *Serbian Eastern Orthodox Diocese* v. *Milovojevich*, 426 U. S. 696, 721 (1976). Yet, in this case, the jury was expressly permitted and even urged to consider the fact that Reverend Moon's international religious movement had no "corporate structure" (Tr. 5521) as evidence that Reverend Moon was lying when he stated that he held the assets in trust for his church. Indeed, the very first factor listed by the trial judge for the jury to consider in his instructions on the law of trusts was the organization of the Unification Church. This instruction permitted the jury to intrude upon the religious prerogatives of the Unification Church to an extent wholly inconsistent with the Constitution's protection of religious liberty.

The Appellate Court's opinion sanctioning this instruction poses a special threat to ministers who serve the poor. Many

such ministers lack the legal sophistication and resources to incorporate their churches even if such a formal structure were consistent with their theology. The Appellate Court's opinion which demands formal structure if a church is to be considered legitimate poses a real and intolerable risk of criminal tax liability for ministers who are unable or unwilling to achieve the type of formal organization demanded by the Appellate Court.

Equally troubling is the fact that the trial court's instructions permitted the jury to decide for itself, on any basis it chose, whether various expenditures made by Moon were made for "personal" or "business" purposes as opposed to "religious" purposes. This again is an area into which the jury had no right to intrude. A religious movement has the right to define for itself "which expenditures are religious and which are secular" *Lemon* v. *Kurtzman*, 403 U. S. 602, 621-22 (1971). If juries may arbitrarily label certain expenditures as "secular" rather than religious, every church which invests funds in secular enterprises in order to finance church activities would be subject to a jury determination that its investments were not religious. This would be an impermissible intrusion of civil government into the right of the churches to organize their affairs as they see fit.

Again, the Appellate Court's opinion poses a particular threat to poorer churches and congregations who lack the sophistication necessary to structure their affairs in the highly formal manner demanded by the Appellate Court. Frequently, inner city and rural congregations entrust funds to their ministers intending such funds to be used for the support of the church as well as for the minister's necessary living expenses. These congregants lack the legal sophistication to utter the words "to be held in trust." The Appellate Court's opinion makes it possible for the ministers who accept these funds in good faith to become subject to prosecution on the theory that the funds were their own personal income. The Appellate Court's decision would rarely burden wealthier churches whose

lawyers and sophisticated congregants have the knowledge to insure that their intentions are clear; rather, by elevating legalistic formalities over true intention, the decision poses an intolerable threat of tax prosecution to poor, unsophisticated religious groups.

In sum, the jury instructions approved by the Circuit Court which upheld Reverend Moon's convictions (by a 2-1 vote) were, in effect, a roving commission for the jury to impose its own views about appropriate organization and expenditures on Reverend Moon and the Unification Church. The result is a precedent which threatens all religious groups and especially poor religious groups by openly authorizing public intrusion upon their internal affairs. It is urgently important that this Court grant certiorari to remove this threat to religious liberty.

CONCLUSION

For all of the reasons stated above, the Southern Christian Leadership Conference, the National Conference of Black Mayors, the National Bar Association and the Honorable Mervyn Dymally as *amici curiae* urge the Court to grant certiorari.

Respectfully submitted,

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